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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/890,841	08/02/2001	Alain Rambach	1567P368	8188
7590	01/04/2005		EXAMINER	
Blakely Sokoloff Taylor & Zafman 7th Floor 12400 Wilshire Boulevard Los Angeles, CA 90025-1026			MARX, IRENE	
			ART UNIT	PAPER NUMBER
			1651	

DATE MAILED: 01/04/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Advisory Action Before the Filing of an Appeal Brief</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	09/890,841	RAMBACH ET AL.

**Examiner**

Irene Marx

Art Unit

1651

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**THE REPLY FILED 16 December 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.**

1.  The reply was filed after a final rejection, but prior to filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a)  The period for reply expires 5 months from the mailing date of the final rejection.  
 b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2.  The reply was filed after the date of filing a Notice of Appeal, but prior to the date of filing an appeal brief. The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3.  The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
 (a)  They raise new issues that would require further consideration and/or search (see NOTE below);  
 (b)  They raise the issue of new matter (see NOTE below);  
 (c)  They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
 (d)  They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: see attachment. (See 37 CFR 1.116 and 41.33(a)).

4.  The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5.  Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.

6.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7.  For purposes of appeal, the proposed amendment(s): a)  will not be entered, or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: \_\_\_\_\_.

Claim(s) objected to: \_\_\_\_\_.

Claim(s) rejected: 1-7 and 25-27.

Claim(s) withdrawn from consideration: \_\_\_\_\_.

#### AFFIDAVIT OR OTHER EVIDENCE

8.  The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9.  The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10.  The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11.  The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attachment.

12.  Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_.

13.  Other: \_\_\_\_\_.

Irene Marx  
Primary Examiner  
Art Unit: 1651

### **DETAILED ACTION**

As noted in the first Office action, error occurs, for example, in the spelling of “galatosidase” in claim 6.

Note:

The proposed amendment raises new issues that would require further consideration and/or search with respect to the replacement of “is” with “having been” in claim 25, raises new issues, including new issues under 35 U.S.C § 112 and of new matter.

#### ***Response to Arguments***

Applicant's arguments have been fully considered but they are not deemed to be persuasive.

Applicant's arguments are directed to claims that are not entered.

Regarding the new matter rejection of record, Applicant's allegations that “X-ACGLMN” (or X-acglm) was “improperly recited in the application” and should properly be “X-GlcNac” or “5-bromo-4-chloro-indolyl-N-acetyl-β-D-glucosaminide”; that MAG-α-Gal “corresponds to” “MAGENTA-Gal and that the full name is “5-bromo-6-chloro-3-indolyl-β-D-galactopyranoside” or that MAL-phos is properly “MAG phos” which is 5-bromo-6-chloro-3-indolyl-phosphate have not been substantiated with appropriate evidence. There is nothing on the record to indicate how the alleged errors occurred or why they were not corrected earlier. It is noted that upon signing the oath or declaration, Applicant acknowledges having reviewed and understood the specification and claims.

Also the extensive use of “b” rather than “β” in the specification and claims is queried. These terms do not appear to be interchangeable. See, also, claim 6.

Regarding “aerobic anaerobic”, the Google search is not informative, since the terms appear to be used as “(aerobic) Anaerobic”, “aerobic/anaerobic”, “aerobic-anaerobic” or “aerobic, anaerobic”. Only one cite contains the terms “facultatively aerobic anaerobic bacteria”, but no definition of the terminology is provided. Therefore, the rejection is deemed proper and it is maintained.

With regard to claims 25-26, as noted in the last Office action, the intended limitations are not readily ascertainable, and applicant's arguments fail to persuade otherwise. Contrary to

Art Unit: 1651

applicant's arguments, claims 25 and 26 contain the recitation of "is cultured", which is a process step.

Applicant argues that Sellers recites indoxyl (indolyl) chemical derivative and that tryptophan is not indolyl. Therefore, the anticipation rejection is improper. However, L-tryptophan is also known as "2-amino-3-indolylpropanoic acid". See e.g., CA INDEX names (attached). Therefore, these arguments fail to persuade.

Upon reconsideration, Applicant's argument is persuasive regarding the inclusion of claims 4 and 5 in the rejection. Therefore, the anticipation rejection is withdrawn for claims 4 and 5.

With respect to the obviousness rejection, applicant argues that Chevalier and Difco are improperly combined because different microorganisms are intended to be cultured and because different additives are supplied to the medium. Applicant's argument that the "references teach entirely distinct inventive purposes and neither teach or suggest usefulness outside the scope of the claimed invention" is puzzling. In any event, there is nothing in DIFCO to suggest that the cysteinated Columbia medium must be used in the alleged context of blood agar. The reference merely suggests that it may be used to make blood agar. Applicant's attention is directed to the box at page 126, for example, which does not mandate the inclusion of blood in the composition. Therefore, one of ordinary skill in this art would have been motivated to use cysteinated Columbia medium instead of MRS agar, for example in the medium of Chevalier, since at least *Streptococcus* are cultured both in Difco and in Chevalier. Therefore, applicant's arguments in this regard are without merit.

Therefore the rejections are deemed proper and are adhered to.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Irene Marx whose telephone number is (571) 272-0919. The examiner can normally be reached on M-F (6:30-3:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael G. Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 1651

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*Irene Marx*

Irene Marx  
Primary Examiner  
Art Unit 1651